# Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of	) File No: EB-09-SJ-0013
Ayustar Corporation	) NAL/Acct. No.:201032680001
San Juan, PR	) FRN:0008739229
	) )

#### FORFEITURE ORDER

Adopted: January 26, 2010 Released: January 28, 2010

By the Regional Director, South Central Region, Enforcement Bureau:

### I. INTRODUCTION

1. In this *Forfeiture Order* ("*Order*"), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000) to Ayustar Corporation ("Ayustar"), a wireless Internet provider using Unlicensed National Information Infrastructure (U-NII) devices in San Juan, PR for willful and repeated violation of Section 301 of the Communications Act of 1934, as amended ("Act"). The noted violations involve Ayustar's operation of unlicensed radio transmitters.

### II. BACKGROUND

- 2. On March 11, 2009, in response to information provided by the Federal Aviation Administration ("FAA") that the Terminal Doppler Weather Radar ("TDWR") that serves the San Juan International Airport had been receiving interference on or adjacent to 5.61 GHz, agents from the Commission's San Juan Office of the Enforcement Bureau ("San Juan Office") and a team of FAA engineers, conducted an investigation on the roof of the Western Bank Plaza Building in Hato Rey. Agents from this office confirmed by direction finding techniques that radio emissions on frequency 5.60 GHz were emanating from the building's roof, the location of one of Ayustar's U-NII devices, Motorola Canopy device, model # 5700BH20, FCC ID ABZ89F-C5804. This Motorola device is certified for use as a U-NII device only on the 5735.0 5840.0 MHz band. Still on March 11, 2009, the agents, with Ayustar's cooperation, conducted on/off tests of Ayustar's equipment. When Ayustar's U-NII device was in the transmit position, the TDWR experienced interference on 5.61 GHz. When Ayustar's U-NII device was in the off position, the interference to the TDWR ceased. According to Commission records, Ayustar does not hold a license to operate on 5.60 MHz from the Western Bank Plaza Building.
- 3. On April 20, 2009, the San Juan Office issued, via certified mail, a Notice of Unlicensed Operation ("*NOUO*") to Ayustar for its operations on March 11, 2009. The *NOUO* was delivered on April 23, 2009 by the United States Postal Service. The *NOUO* advised Ayustar of its obligation to comply with Section 301 of the Act.
- 4. On August 22, 2009, in response to information provided by the FAA that the TDWR serving the San Juan International Airport was again experiencing interference on or adjacent to 5.61 GHz, an agent of the San Juan Office and a team of FAA engineers, conducted an investigation on the

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<sup>&</sup>lt;sup>1</sup> 47 U.S.C. § 301; see also 47 C.F.R. §§ 15.1(b), 15.407.

roof of the Western Bank Plaza Building in Hato Rey. An agent from this office confirmed by direction finding techniques that radio emissions on frequency 5.624 GHz were emanating from the building's roof, the location of one of Ayustar's U-NII devices, Motorola Canopy device, model # 5700, FCC ID ABZ89FC4816. This Motorola device is certified for use as a U-NII device only on 5745-5805 MHz band. Still on August 22, 2009, the agent, with Ayustar's cooperation, conducted on/off tests of Ayustar's equipment. When Ayustar's U-NII device was in the transmit position, the TDWR experienced interference on 5.61 GHz. When Ayustar's U-NII device was in the off position, the interference to the TDWR ceased. According to Commission records, Ayustar does not hold a license to operate on 5.624 MHz from the Western Bank Plaza Building.

5. On November 12, 2009, the San Juan Office issued a *Notice of Apparent Liability for Forfeiture* to Ayustar in the amount of ten thousand dollars (\$10,000), for the apparent willful and repeated violation of Section 301 of the Act.<sup>2</sup> Ayustar submitted a response to the *NAL* requesting reduction or cancellation of the proposed forfeiture.

### III. DISCUSSION

- 6. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act, Section 1.80 of the Rules, and The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 12 FCC Rcd 17087 (1997), recon. denied, 15 FCC Rcd 303 (1999) ("Forfeiture Policy Statement"). In examining Ayustar's response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.
- 7. Section 301 of the Act requires that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States except under and in accordance with the Act and with a license. Part 15 of the Rules, however, sets forth conditions under which intentional radiators may operate without an individual license. Pursuant to Section 15.1(b) of the Rules, the operation of an intentional or unintentional radiator that is not in accordance with the regulations in [Part 15] must be licensed pursuant to the provisions of section 301 of the Communications Act.... Thus, if intentional radiators fail to comply with all of the applicable conditions set forth in Part 15 of the Rules, they are not authorized to operate in the United States without a license. Section 15.201(b) of the Rules provides that all intentional radiators operating under Part 15 shall be certificated by the Commission. Section 15.1(c) of the Rules states that the operation of an intentional radiator that is not in compliance with the administrative and technical provisions in this part is prohibited. Part 15 Subpart E of the Rules sets forth more specific conditions under which U-NII devices may operate in the, 5.47-5.725 GHz, and 5.725-5.825 GHz bands.

<sup>&</sup>lt;sup>2</sup> Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 201032680001 (Enf. Bur., San Juan Office, November 12, 2009) ("NAL").

<sup>&</sup>lt;sup>3</sup> 47 U.S.C. § 503(b).

<sup>&</sup>lt;sup>4</sup> 47 C.F.R. § 1.80.

<sup>&</sup>lt;sup>5</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>&</sup>lt;sup>6</sup> 47 U.S.C. § 301.

<sup>&</sup>lt;sup>7</sup> See 47 C.F.R. §§ 15.1 et seq.

<sup>&</sup>lt;sup>8</sup> 47 C.F.R. § 15.1(b).

<sup>&</sup>lt;sup>9</sup> See 47 C.F.R. § 15.401 et seq.

- 8. On March 11, and August 22, 2009, an agent from the San Juan Office observed Ayustar operate a U-NII device on the center frequencies of 5.60 and 5.624 GHz, respectively. The device in use on March 11, 2009 was certified for use as a U-NII device only on the 5735.0 5840.0 MHz band, and the device in use on August 22, 2009 was certified for use as a U-NII device only on 5745-5805 MHz band. Accordingly, the devices were not certified to operate as U-NII devices on 5600 and 5624 MHz, respectively. Because Ayustar operated U-NII devices on frequencies for which they were not certified, Ayustar did not operate its U-NII devices in compliance with Part 15 requirements. Consequently, its operations were unauthorized. According to information in the Commission's database, Ayustar holds no authorization to transmit on 5.60 or 5.624 GHz. Ayustar was informed that operation of a Part 15 device not in compliance with all of the Part 15 requirements renders the operation unlicensed via written *NOUO* prior to the inspection conducted on August 22, 2009. In its response to the *NAL*, Ayustar did not deny any of the facts set forth in the *NAL*. Based on the evidence and technical information before us, we find that Ayustar willfully and repeatedly violated Section 301 of the Act by operating radio transmitters without a license on March 11 and August 22, 2009.
- 9. Ayustar requests reduction or cancellation of the forfeiture based "solely on the lack of capacity of Ayustar to pay the established fine." With regard to an individual's or entity's inability to pay, the Commission has determined that, in general, gross revenues are the best indicator of an ability to pay a forfeiture. We have reviewed the financial information provided by Ayustar and have determined that its gross revenues do not warrant a reduction in forfeiture.
- 10. We have examined Ayustar's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we find no basis for cancellation or reduction of the \$10,000 forfeiture proposed for these violations.

## IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules, Ayustar Corporation **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of ten thousand dollars (\$10,000) for violations of Section 301 of the Act.<sup>14</sup>

<sup>&</sup>lt;sup>10</sup> Moreover, assuming *arguendo* that Ayustar's transmitters were not U-NII devices and were instead general Part 15 unlicensed intentional transmitters, Ayustar also apparently failed to comply with the power limits contained in Section 15.407(2) of the Rules. 47 C.F.R. § 15.407(2). Section 15.407(2) restricts output power in the 5.47-5.725 GHz band to 0.25 Watts. Pursuant to the U-NII rules, which authorize higher power levels, both devices utilized by Ayustar are designed to operate with 0.8 watts output power. Accordingly, Ayustar's operations on April 20 and August 22, 2009 did not comply with the general Part 15 power limits.

<sup>&</sup>lt;sup>11</sup> Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act...." See Southern California Broadcasting Co., 6 FCC Rcd 4387 (1991).

<sup>&</sup>lt;sup>12</sup> As provided by 47 U.S.C. § 312(f)(2), a continuous violation is "repeated" if it continues for more than one day. The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312. *See* H.R. Rep. 97<sup>th</sup> Cong. 2d Sess. 51 (1982). *See Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991) and *Western Wireless Corporation*, 18 FCC Rcd 10319 at fn. 56 (2003).

<sup>&</sup>lt;sup>13</sup> See PJB Communications of Virginia, Inc., 7 FCC Rcd 2088, 2089 (1992) (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); Local Long Distance, Inc., 16 FCC Rcd 24385 (2000) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator's gross revenues); Hoosier Broadcasting Corporation, 15 FCC Rcd 8640 (2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues).

<sup>&</sup>lt;sup>14</sup> 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§§ 0.111, 0.311, 1.80(f)(4).

- Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the 12. Rules within 30 days of the release of this Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act. 15 Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank - Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Ayustar will also send electronic notification on the date said payment is made to SCR-Response@fcc.gov.
- 13. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Ayustar Corporation at its address of record.

FEDERAL COMMUNICATIONS COMMISSION

Dennis P. Carlton Regional Director, South Central Region Enforcement Bureau

<sup>&</sup>lt;sup>15</sup> 47 U.S.C. § 504(a).